UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

UNION DE TRABAJADORES DE MUELLES, LOCAL 1740, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (SSA SAN JUA, INC.)	Case 12-CB-210091
	Case 12-CB-22003
	Case 12-CB-220487
and	Case 12-CB-221955
LUIS M. MONTES PEREZ, AN INDIVIDUAL	

AMENDED MOTION REGARDING RESPONSIBILITY OF SSA SAN JUAN TO THE CHARGING PARTY

Respondent, International Longshoremen's Association, Local 1740, AFL-CIO (hereinafter Respondent Union or Local 1740), through their undersigned attorneys, respectfully AVERS and PRAYS as follows:

1. This case was initiated with a Charge filed by Luis M. Perez Montes, Luis Dávila and Angel García, as employees of SSA San Juan, Inc. (SSA), against the Respondent Union.
2. SSA, is the employer of Luis M. Pérez Montes, Luis Dávila and Angel García. The employer has recognized the Charged Party, Local1740, as the [Section 9(a)] exclusive collective-bargaining representative of the employees.[1] Perez, Montes and Davila are part of such appropriate unit.

[1] According to Article I of the Collective Bargaining Agreement between SSA and Local 1740, the appropriate unit is includes "all which operators, signalmen, stevedores, plank men, drivers, car attendants, hatchtenders, boss foreman, motorist (including operators of all types of motorized equipment such as ground cranes, fingerlifts, top loaders and/or any other similar type of motorized equipment) and water carriers who work at the San Juan port; excluding supervisors, managers, administrative personnel, clerks, professional employees, confidential employees and security employees."

3. SSA and Local 1740 subscribed a collective bargain agreement (hereinafter CBA) which is full force since June 23, 2016 until September 30, 2019.
4. The Article II of the CBA establishes a union-security clause, between Local 1740 and SSA, as permitted by Section 8(a)(3) of the NLRA. In summary, as a condition of employment, all employees in a bargaining unit become union members and begin paying union dues and fees within 31 days of being hired.[2]
5. The NLRB and the Second Circuit of the United States District Court have determined that an employer that signs a union-security clause with any labor organization may be liable for improperly discharging an employee pursuant to that agreement, regardless of its good-faith belief concerning union status. *California Saw & Knife Works*, 320 NLRB 224, 246 (1995); *NLRB v. Sucrest Corp.*, 409 F.2d 765, 771-72.
6. This employer's duty of care derives from the second proviso in Section 8(a)(3) of the NLRA and forbids employers from discharging a non-member employee if they have "reasonable grounds for believing" that membership was denied for reasons other than failure to tender dues and fees.
7. As part of our groundwork for the January 15, 2019 hearing, we acquired information that the NLRB must have knowledge that SSA knew of the alleged discharge of the employees Montes, Dávila and García, and the alleged reasons for it. For motivations that escape our reasoning, the NLRB has failed to include SSA as a Charged Party in the Complaint.
8. We believe that during the investigation of the charges made by the NLRB, this information *must* have

[2] The article II of the CBA reads as follows: "Affiliation to the Union shall be a condition of employment on or after the thirty-first day following the commencement of such employment, as long as the employer has no reasonable basis to believe: (1) that such affiliation was **not** available to the employee on the same terms and conditions generally applicable to other members; and (2) that affiliation to the Union was **not** refused or terminated for reasons other than the failure of the employee to tender periodic dues or initiation fees uniformly required as a condition for acquiring or retaining membership in the Union. In Spanish the CBA Article read as: *"El afiliarse a la Unión será una condición de empleo en o después del trigésimo primer día siguiente al comienzo de tal empleo, siempre y cuando que el patrono no tenga base razonable para creer: (1) que tal afiliación no estaba disponible para el empleado en los mismos términos y condiciones generalmente aplicables a otros miembros y (2) que la afiliación a la Unión no fue rehusada o terminada por otras razones que no fueran la falta por el empleado de ofrecer el pago de las cuotas periódicas o las cuotas de iniciación uniformemente requeridas como condición para adquirir o retener la afiliación a la Unión".*

been discussed with the witnesses and/or the parties or is part of the evidence discovered during the Board´s investigation. Moreover, we understand that if the NLRB is to find any unfair labor practice by the Union, SSA *must* have full knowledge of it. Hence, if SSA had any knowledge of any unfair labor practice by the Respondent Union regarding Section 8(a)(3) of the NLRA, its second proviso *must* be activated for the employer to share any responsibility.

9. If we assumed that the allegations made by the NLRB in the consolidated complaint are true, it is reasonable to believe that the employer knew about the alleged discharge or dismissal of Montes, Dávila and Garcia. "By virtue of the first proviso section 8 (a) (3), an employer that is bound by a union security clause….will **not** be deemed to have committed an unfair labor practice if it discharges an employee at the union's request for failure to tender dues and fees owed pursuant to the clause. **This immunity is lost, pursuant to the second proviso of section 8 (a) (3), if the employer has reasonable grounds to believe that the discharge was actually requested for reasons other than the employer's failure to make the requisite dues and initiation fees tender**", *California Saw & Knife Works*, 320 NLRB 221, 246.
10. If the employees were regularly referred to work, the employer never asked or investigate why, since or about March 31, 2017 Montes, Davila and García were **not** called anymore to work at the SSA site. SSA, as employer, has a duty of care under the NLRA, a duty of care which forbids employers from discharging an employee if they have reasonable grounds for believing that membership was denied for reasons other than the failure to tender dues and fees (second proviso to Section 8(a)(3)).
11. Again, if we assume that the allegations of the General Counsel are true, then, SSA has *reasonable grounds to believe* that the alleged discharge of Montes, García and Dávila was requested for reasons other than the employee's failure to make the requisite dues and initiation fees tender. "In determining whether such grounds exist, an employer has a duty of inquiry only where the employer is aware of facts that would lead to believe that the discharge may be for an improper purpose., *H.C Macaulay Foundry v. NLRB*, 553 F.2d 1198, 1202 (9th Cir. 1977).
12. As an example, a discharged employee told the employer that he did **not** know his responsibility under

the union-security clause of the CBA. Here, the NLRB held that this tiny piece of information was sufficient to put the employer on notice that the Union might **not** have fulfilled its obligations. *Conductron Corp.*, 183 NLRB 419, 427.

13. Under the NLRA, both the employer and the union have legal and contractual obligations that arise from the union-security provision. The duty of care of the employer requires at least an inquiry when it has reasonable grounds to believe the Act has been violated. As far as we know, SSA has failed in that duty and *must* be included to share any responsibility, if any is found, as a result of this cause of action.
14. *Even though the Union does **not** admit any wrongdoing*, in the light of the allegations stated in this motion, the employer is an indispensable party to this action. If the allegations of the General Counsel are found to be true, a complete judgement and/or remedy cannot be rendered without SSA.
15. SSA San Juan, Inc., as employer, has to be included as a charged party or respondent in this consolidated complaint. The NLRB can **not** make a final judgment or order that concludes all the controversies without making a determination about the responsibility of the employer to the charging party.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 30th day of January 2019.

I CERTIFY that on this same date I electronically filed the foregoing with the NLRB system which will send a notification to the charging parties, at his electronic address of record.

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